IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
Borrello, PJ, and Meter and Shapiro, JJ

JOSEPH PALETTA AND SHELLY PALETTA,

Plaintiffs-Appellees,

v

OAKLAND COUNTY ROAD COMMISSION,

Defendant-Appellant,

-and-

SUPREME SWEEPING SERVICES, INC.,

Defendant.

Supreme Court Docket No. 143663

Court of Appeals Docket No. 298238

Oakland County Circuit Court
Case No 08-093717-NO

BRIEF OF *AMICUS CURIAE* MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL IN SUPPORT OF DEFENDANT-APPELLANT OAKLAND COUNTY ROAD COMMISSION

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INTRODUCTION

This appeal presents issues concerning the highway exception to governmental immunity and the actual or constructive knowledge requirement that accompanies it. Plaintiffs allege bodily injury as a result of a motorcycle crash which they contend was caused by sand or gravel that had accumulated on top of a paved highway surface. Appellant Oakland County Road Commission (the "Road Commission") was denied summary disposition based on governmental immunity. The Court of Appeals affirmed, specifically concluding that gravel sitting on top of a paved highway is a surface defect that implicates the highway exception to immunity, and further that the Road Commission had the requisite knowledge of the defect because a resident living near the accident site had called the Road Commission at unspecified times in the past to inform it of gravel on the highway surface in that area, and that the gravel had allegedly caused unspecified accidents.

The Road Commission should have received summary disposition. An accumulation of gravel on a paved highway surface is not a defect within the physical structure of the roadbed surface. Absent a defect in the physical structure of the roadbed surface, governmental immunity is not waived pursuant to the highway exception. *Nawrocki* v *Macomb Cty Rd Comm'n*, 463 Mich 143, 183; 615 NW2d 702 (2000). Moreover, a road commission cannot have the requisite actual or constructive knowledge of the defect by virtue of being informed by a citizen, at unspecified times in the past, of supposedly similar highway defects. To the contrary, the knowledge statute requires that a road commission have actual or constructive knowledge of the specific defect alleged to have caused an accident. Absent such knowledge, governmental immunity is not waived.

For the reasons discussed at length, herein, Amicus Curiae MCRCSIP respectfully requests that this Court address these issues of statewide importance and reverse the lower courts' decisions.

STATEMENT OF APPELLATE JURISDICTION

Amicus curiae Michigan County Road Commission Self-Insurance Pool ("MCRCSIP" or the "Pool") adopts Appellant Oakland County Road Commission's Statement of Appellate Jurisdiction.

STATEMENT OF *AMICUS CURIAE* INTEREST

The Michigan County Road Commission Self-Insurance Pool ("MCRCSIP" or the "Pool") supplies, among other things, general liability and auto coverage for 78 county road commissions within the state of Michigan. According to statistics published by the Michigan Department of Transportation, county road commissions within this state are responsible for maintaining 89,755 miles of county roads. www.michigan.gov/mdot/0,1607,7-151-9620_11154-129683--,00.html (visited March 19, 2012).

The Pool was organized pursuant to Michigan statutory authority, MCL 124.5, and began operation on April 1, 1984. It is governed by a Trust Agreement and an Inter-Local Agreement signed by all members, and also by an approved set of by-laws. The individual county road commissions are the members of the Pool. In other words, the Pool is comprised of the very entities that it serves.

Three main objectives for pooling have been identified by the Pool: (1) to allow members to manage, control, and reduce losses by establishing a joint effort to vigorously defend claims, and by providing a united effort to effect favorable legislation; (2) to maintain control over funds necessary to provide needed protection; and (3) to lower ultimate costs. Consistent with its history and stated objectives, the Pool has a strong interest in any aspect of the law which could impact the day-to-day operations, and exposure to tort liability arising from those operations, of its members. Along these lines, the Pool has a strong interest in ensuring that the exceptions to governmental immunity are construed consistently and narrowly.

For these reasons, MCRCSIP and its member road commissions have a strong interest in the issues presented here.

STATEMENT OF ISSUES PRESENTED

Amicus Curiae MCRCSIP adopts Defendant-Appellant Oakland County Road Commission's Statement of Issues Presented.

STATEMENT OF FACTS

Amicus Curiae MCRCSIP adopts Defendant-Appellant Oakland County Road Commission's Statement of Facts.

STANDARD OF REVIEW

The granting or denial of summary disposition is reviewed *de novo*. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007). "Questions of statutory interpretation are also reviewed *de novo*." *Id.*

ARGUMENT

I. THE OAKLAND COUNTY ROAD COMMISSION IS ENTITLED TO SUMMARY DISPOSITION BECAUSE AN ACCUMULATION OF GRAVEL ON TOP OF A PAVED ROADWAY IS NOT AN ACTIONABLE DEFECT PURSUANT TO THE HIGHWAY EXCEPTION TO GOVERNMENTAL IMMUNITY.

The Oakland County Road Commission (the "Road Commission") should have received summary disposition for the reason that the alleged highway defect—gravel on top of a paved roadway—is not an actionable defect pursuant to the highway exception to governmental immunity.

A. Fundamental Principles of Governmental Immunity.

The Legislature has the power to create a right to recover damages for injuries received due to the negligence of public authorities. *See, e.g., Sziber* v *Stout*, 419 Mich 514; 358 NW2d 330 (1984) (discussing the highway exception to governmental immunity); *Burnham v Byron Twp*, 46 Mich 555; 9 NW 851 (1881) (same). Because this right is purely statutory, the Legislature has the power to modify, abridge, or even abolish that right by appropriate action. *Westgate* v *Adrian Twp*, 161 Mich 333; 126 NW 422 (1910). The Legislature can also attach to the right conferred any limitation it chooses. *Moulter v City of Grand Rapids*, 155 Mich 165; 118 NW 919 (1908) (overruled on other grounds in part by, *Grubaugh v City of St Johns*, 384 Mich 165; 180 NW2d 778 (1970)). Whether the limitations imposed are reasonable or unreasonable are questions for the Legislature and not for the courts, *id.*, so long as a limitation on a vested right does not violate the Constitution, *Grubaugh v City of St Johns*, 384 Mich at 175 (abrogated on other grounds, *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007)).

In Michigan, immunity for non-sovereign units of government is provided by statute in the Governmental Tort Liability Act ("GTLA"), MCL 691.1401, et seq. Section 7 of the GTLA

confers sweeping immunity on governmental agencies performing governmental functions. MCL 691.1407(1). Where the governmental agency is performing a governmental function, the immunity under § 7 is as broad as possible—extending to all governmental agencies for all tort liability. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000) (consolidated with *Evens* v *Shiawassee Co Rd Comm'rs*).

The only exceptions to the broad grant of immunity are contained within the GTLA itself. *Id.* at 157 ("although governmental agencies may be under many duties, with regard to the services they provide to the public, only those enumerated within the statutorily-created exceptions are legally compensable if breached"). In *Nawrocki*, the Court stated that the purpose of its earlier opinion in *Ross v Consumers Power Co (on reh'g)*, 420 Mich 567; 363 NW2d 641 (1984), was to create a "cohesive, uniform, and workable set of rules which will readily define the injured party's rights and the governmental agency's liability." *Id.* at 148-149. The *Nawrocki* Court commented that the failure to consistently follow *Ross* "has precipitated an exhausting line of confusing and contradictory decisions" which have created a "rule of law that is virtually impenetrable, even to the most experienced judges and legal practitioners." *Id.* at 149. Accordingly, the *Nawrocki* court "return[ed] to a narrow construction of the highway exception predicated upon a close examination of the statute's plain language, rather than merely attempting to add still another layer of judicial gloss to those interpretations of the statute previously issued by [the Supreme Court] and the Court of Appeals." *Id.* at 150. In short, the immunity granted to governmental agencies is broad, and the statutory exceptions must be narrowly construed. *Nawrocki*, 463 Mich at 158-159.

In reviewing questions of statutory construction, a court's role is to discern the Legislature's intent. *Nawrocki,* 463 Mich at 159. This is accomplished by examining the plain

language of the statute, and providing words with a common and ordinary meaning. *Id.* This plain language requirement, combined with the narrow construction requirement, is perhaps best illustrated by this Court's decision in *Stanton v City of Battle Creek*, 466 Mich 611; 647 NW2d 508 (2002). There, because the term "motor vehicle," as used in MCL 691.1405, was not defined in the statute, this Court utilized various dictionaries to arrive at the term's common and ordinary meaning. *Stanton*, 466 Mich at 617. The *Stanton* Court held that because immunity exceptions must be narrowly construed, where there are competing dictionary definitions only the narrowest one should be used. *Id.*

B. The Highway Exception to Governmental Immunity.

The highway exception to immunity, codified at MCL 691.1402, states:

> Sec. 2. (1) Except as otherwise provided in section 2a, each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. **A person who sustains bodily injury** or damage to his or her property **by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency**. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21. **The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. . . .**

MCL 691.1402(1) (emphases added).

The meaning of this statute is well settled. In *Nawrocki*, 463 Mich at 159-162, the Supreme Court stated that the first sentence of the statutory clause, crucial in determining the scope of the highway exception, describes the basic duty imposed on all governmental agencies, including the state's, having jurisdiction over any highway:

> "[T]o maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." This sentence establishes the duty to keep the highway in reasonable repair. The phrase "so that it is reasonably safe and convenient for public travel" refers to the duty to maintain and repair. **The plain language of this phrase thus states the desired outcome of reasonably repairing and maintaining the highway; it does not establish a second duty to keep the highway "reasonably safe."**

Id. at 160 (emphasis added). The Court then observed that the fourth sentence of the statute limits the duty created by the first sentence:

> The fourth sentence of the statutory clause, specifically applicable to the state and county road commissions, proceeds to narrowly limit the general duty to repair and maintain, created by the *first* sentence "only to the improved portion of the roadway designed for vehicular travel." . . . We believe the plain language of this sentence definitively limits the state and county road commission's duty with respect to the *location* of the alleged dangerous or defective condition; if the condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable and liability does not attach.

Id. at 161-162 (emphasis in original).

Under *Nawrocki, supra*, a county road commission is only held to the specific duty to repair and maintain the roadway:

> [t]he state and county road commissions' duty, under the highway exception, is only implicated upon their failure to repair or maintain the actual physical structure of the roadbed surface, paved or unpaved, designed for vehicular travel, which in turn proximately causes injury or damage.

Id. at 183 (citing *Scheurman v Dep't of Transportation*, 434 Mich 619, 631; 456 NW2d 66 (1990)). The *Nawrocki* Court took care to note that the duty to repair or maintain is limited to physical defects "in the roadbed's surface," and must not be construed as a mandate to ensure that travel is "reasonably safe on governmental highways." *Nawrocki*, 463 Mich at 176-177 n32. In other words, "[t]he state and county road commissions' duty, under the highway exception, is only implicated upon their failure to repair or maintain the actual physical structure of the

roadbed surface, paved or unpaved, designed for vehicular travel, which in turn proximately causes injury or damage." *Nawrocki*, 463 Mich at 183.

This Court further elaborated on this specific duty in *Hanson v Bd of County Rd Comm'rs of County of Mecosta*, 465 Mich 492; 638 NW2d 396 (2002), where the plaintiff argued that the highway exception to immunity included a duty to design or to correct defects from the original design of the roadway. The Court disagreed with the plaintiff, instead articulating a far more narrow duty:

> In the highway exception, the Legislature has said that the duty of the road commission is to "*maintain* the highway in reasonable repair so that it is reasonably safe and convenient for public travel." The statute further provides that the specific duty of the state and county road commissions is to "*repair and maintain*" highways. "Maintain" and "repair" are not technical legal terms. In common usage, "maintain" means "to keep in a state of repair, efficiency, or validity: preserve from failure or decline." *Webster's Third New Int'l Dictionary, Unabridged Edition* (1966), p. 1362. Similarly, "repair" means "to restore to a good or sound condition after decay or damage; mend." *Random House Webster's College Dictionary* (2000), p. 1119.
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> * * *
>
> The Legislature has clearly limited the duty of the road commission to the repair and maintenance of the roadways . . . .

Id. at 502-503, 504 (emphasis in original).

In short, reading *Nawrocki* and *Hanson* in tandem requires the conclusion that the single duty which gives rise to liability against a county road commission in relation to highway defects is the duty to preserve the actual physical structure of the highway surface from failure or decline, or to restore the surface to a good or sound condition after decay or damage.

C. <u>An Accumulation of Gravel on Top of a Paved Highway Surface Is Not a Defect in the Physical Structure of the Roadbed Surface</u>.

Summary disposition was required in favor of the Road Commission because an accumulation of dirt, sand or gravel on top of a paved highway surface is not a defect in the

physical structure of the roadbed surface. In other words, the supposed highway defect relied upon by the plaintiffs to circumvent governmental immunity is not one that is actionable under MCL 691.1402.

An accumulation of dirt, sand or gravel on top of a paved highway surface necessarily exists **above** the highway surface. It is, by analogy, not materially different than the alleged missing traffic signal discussed in *Nawrocki*, 463 Mich at 154. Nor, for that matter, is it different than sight distance and vision restrictions caused by foliage, as discussed in *Nawrocki*, 463 Mich at 183-184. Alleged defects that exist outside the **physical structure of the roadbed surface** are considered merely "points of hazard" along the roadway. *Nawrocki* made clear that there is no potential liability created by mere "points of hazard." *Id.* at 176. For these reasons, an accumulation of sand and gravel on top of a highway surface is not a physical defect in the structure of the roadbed surface, and therefore cannot give rise to liability against a county road commission. *See id.*, 463 Mich at 176-177 n32.

Numerous cases have addressed and rejected highway liability claims arising from allegations of a natural substance that accumulated over a highway surface and had caused an injury. The seminal case from this Court is *Haliw v Sterling Heights*, 464 Mich 297; 627 NW2d 581 (2001). There, the plaintiff alleged that an impression in the sidewalk (the highway defect) had permitted water to pond and freeze to the point where she slipped. She alleged that even though she had never come into contact with the actual sidewalk depression, the fact that it had permitted water to accumulate and freeze was sufficient for her claim to avoid immunity. This Court rejected her argument, holding:

> Simply put, a plaintiff cannot recover in a claim against a governmental agency where the sole proximate cause of the [injury] is the natural accumulation of ice or snow. This is true even where the ice or snow naturally accumulates in a portion of the [highway] that was otherwise not "reasonably safe and

> convenient for public travel.' *Hopson*, *supra* at 250. Rather, there must exist a combination of the ice or snow and the defect that, in tandem, proximately causes the slip and fall.

Haliw, 464 Mich at 311. The Court also noted that "*[t]his other defect, however, is not a proximate cause within the meaning of this rule, simply because it causes the accumulation of ice or snow.*" *Id.* at 307 (emphases in original). This analysis does not depend on the cause of the depression that allows an accumulation of ice or snow. *Id.* In short:

> In the absence of a persistent defect in the [highway], rendering it unsafe for public travel at all times, and which combines with the natural accumulation of ice or snow to proximately cause injury, a plaintiff cannot prevail against an otherwise immune municipality.

Id at 312.

This Court has also examined whether an accumulation that was "unnatural," i.e., man-made, should be treated any differently for immunity purposes than one that was natural. In *Estate of Buckner v City of Lansing*, 480 Mich 1243; 747 NW2d 231 (2008), the Court held that whether an accumulation was natural or unnatural did not matter for immunity purposes because such an accumulation did not constitute a highway "defect." *Id.* at 1244. Without first establishing a highway defect, a plaintiff cannot demonstrate that the defendant failed to "maintain" a highway under its jurisdiction in reasonable repair. *Id.*

The Court of Appeals has also weighed in on these questions. In *Burton v Waterford Twp*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2007 (Docket No. 274332) **(Exhibit 1)**, the plaintiff alleged that he lost control of his bicycle when its tires slipped on mud or algae that had accumulated on a sidewalk under a large puddle of standing water. In ordering summary disposition for the defendant Township, the Court of Appeals cited this Court's decision in *Haliw*, *supra*, for the proposition that the accumulation of a natural substance on top of a highway is not an actionable defect within the meaning of the highway exception. Rather, to state a claim under that exception, a plaintiff must show that the injuries were

proximately caused by a defect in the highway itself that was "persistent" in the sense that it rendered the highway "unsafe for public travel at all times . . . ." *Id.* at *1. As observed by the Court:

> In the present case, there was no "persistent defect" in the sidewalk that rendered it "unsafe for public travel at all times." [*Haliw*, 464 Mich] at 312. Instead, it was merely demonstrated that an accumulation of water and mud had collected in or around the sidewalk depression, and that the water and mud caused plaintiff's accident. In other words, while the depression may have indirectly led to the accident, reasonable minds could not conclude that a structural defect itself was the direct cause of plaintiff's injuries. Simply put, because there was no showing that the depression in the sidewalk was a "persistent defect" that directly caused plaintiff's injuries, summary disposition should have been granted in favor of defendant on the basis of governmental immunity. [*Haliw*, 464 Mich] at 311-312.

Id. at *2.

Similarly, in *Ulrich v Dep't of Transportation*, unpublished opinion per curiam of the Court of Appeals, issued April 14, 2005 (Docket No. 252525) **(Exhibit 2)**, the Court of Appeals ordered summary disposition in favor of the Michigan Department of Transportation ("MDOT") from plaintiff's claim that his single-car accident was caused by defendant's failure to remove vegetation and dirt that had accumulated along the shoulder of the highway, and which allowed water to pool on the traveled portion, which caused plaintiff's vehicle to hydroplane out of control. *Id.* at *1. In ordering summary disposition for MDOT, the Court observed that the plaintiff's contention that lax maintenance, including failing to mow, cut, or dig away growth and vegetation on the roadbed, together with accumulated sand and gravel debris, was not premised on an actual road defect, but was at most premised on a claimed design defect inasmuch as water was allowed to pool on the roadway. *Id.* at *1.

In *Watley v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued August 25, 2005 (Docket No. 260510) **(Exhibit 3)**, the Court of Appeals affirmed the

grant of summary disposition to the City of Detroit in a case where the plaintiff alleged that a sidewalk was defective because it was covered by mud and water that had emanated from a nearby leaking pipe. The Court observed that there was nothing in the record to demonstrate that plaintiff's injuries were proximately caused by a defect in the sidewalk that needed repair, as opposed to simply a condition existing on top of the sidewalk surface. *Id.* at *1.

In *Sonsynath v Dep't of Transportation*, unpublished opinion per curiam of the Court of Appeals, issued April 15, 2003 (Docket No. 233768) **(Exhibit 4)**, the plaintiff's decedent was involved in a fatal automobile crash that occurred when his vehicle encountered a "five to six-inch current of water" along I-94. Plaintiff's vehicle hydroplaned off the road and turned upside down into a water-filled ditch. *Id.* at *1. The plaintiff's theory was that the water accumulated on top of the roadway, which had occurred because of a flash flood, implicated the highway exception to governmental immunity. *Id.* at *1. The Court of Appeals rejected that argument, concluding that the plaintiff's theory of liability was "not based on an actual defect on the roadbed itself, but rather on an alleged design defect, coupled with the excessive rainfall and defendant's failure to warn about the hazardous condition." *Id.* at *2.

In *Ballard v Clinton Co Rd Comm*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2004 (Docket No. 244130) **(Exhibit 5)**, the plaintiff was injured when she lost control of her car after it hydroplaned on "several inches of water" that covered the road on which she was traveling. This Court reiterated that a county road commission is liable only if it fails to repair or maintain "'the actual physical structure of the roadbed surface, paved or unpaved, designed for vehicular travel.'" *Id.* at *1 (quoting *Nawrocki*, 463 Mich at 183). The Court concluded that neither a "culvert nor water standing on the road constitutes part of the physical structure of the roadbed designed for public travel." *Id.*

In *Calamita v City of St Clair Shores*, unpublished opinion per curiam of the Court of Appeals, issued March 9, 2004 (Docket No. 236755) **(Exhibit 6)**, the plaintiff slipped on a sidewalk that was adjacent to a broken water/sewer line, and had consequently been covered with slippery, wet mud. The Court observed that the allegation of an accumulation of mud on the sidewalk implicated "no deficiency in the sidewalk requiring repair." *Id.* at *3.

In summary, then, this Court and the Court of Appeals have issued numerous decisions addressing claims that natural substances on top of a highway surface—whether those substances accumulated naturally or unnaturally—constituted a defect within the meaning of the highway exception. In those cases, the courts have roundly rejected the suggestion that accumulations constitute actionable defects within the meaning of the statute.

This is not to say, however, that wherever an accumulation of a natural substance plays some part in an injury, that the plaintiff will be precluded from bringing suit. To the contrary, pursuant to *Haliw*, for a plaintiff to successfully plead an avoidance of immunity she must demonstrate that (1) there existed within the physical structure of the roadbed surface a defect that rendered the highway not reasonably safe for public travel **at all times**, and (2) that the actual defect caused the injury either by itself, or in tandem with an accumulation of a natural substance. The key is that whatever role the natural substance is alleged to have played, it also must be the case that the separate **highway surface defect** contributed to the injury in some way other than merely creating an area for the natural substance to accumulate.

Here, the plaintiffs do not rely upon any persistent defect that rendered the highway unsafe at all times, and further fail to demonstrate that any persistent highway defect caused the injury either by itself for in tandem with a natural substance accumulated on the surface. The alleged accumulation of gravel on the highway surface is a short-lived, transitory condition

whose presence would be dependent on variables such as vehicular traffic and weather conditions.

In sum, this case is no different than any of the water, mud, algae, or snow cases that have already been rejected by Michigan's appellate courts. For this reason, the plaintiff's claim fails to avoid governmental immunity, and the Road Commission should have received summary disposition.

D. The Cases Relied Upon by the Court of Appeals to Support Its Reasoning That Governmental Agencies Can Be Liable for Obstructions on a Roadway Are Inapposite.

To support its affirmance of the denial of summary disposition, the Court of Appeals reasoned that "the law has long recognized the potential liability of governmental agencies for obstructions on a sidewalk or roadway." *Paletta v Oakland Co Rd Comm*, unpublished opinion per curiam of the Court of Appeals, issued July 21, 2011 (Docket No. 298238). The Court cited three cases: *Weddeburn v Detroit*, 144 Mich 684; 108 NW 102 (1906); *Brown v City of St Johns*, 187 Mich 641; 154 NW 79 (1915); and *Joslyn v Detroit*, 74 Mich 458; 42 NW 50 (1889). These cases are inapposite for multiple reasons.

First, none of these three cases construe the liability imposed upon a county road commission pursuant to the highway exception to governmental immunity, MCL 691.1402. To the contrary, the most recent of these cases, *Brown v City of St Johns*, was decided in 1915, roughly 50 years prior to the adoption of the Governmental Tort Liability Act. As recited above, the plaintiffs' cause of action against the Road Commission is entirely statutory, and is subject to the limitations included within the statute itself. The cases relied upon by the Court of Appeals, therefore, do not even purport to construe the statute that provides plaintiffs' cause of action, and necessarily do not construe the limitations of that statute.

Building from this observation, the cases relied upon by the Court of Appeals are distinguishable in one particular critical aspect: the liability that existed when those cases were decided lacked a specific limitation that is imposed in the current statute. For example, in *Joslyn v City of Detroit*, 74 Mich 458; 42 NW 50 (1889), the Court quoted the version of the highway liability statute that had been passed by the Michigan Legislature ten years earlier, in May 1879. The *Joslyn* court observed that the statute "makes the City not only liable for injuries occurring through neglect to keep the streets in repair, **but also for such as occur by reason of the neglect of the City to keep its streets in a condition reasonably safe and fit for travel.**" *Joslyn*, 74 Mich at 460 (emphasis added). The Court further elaborated:

> **The duty is imposed in both cases, and the necessity for it exists in the one case just as much as the other,** and the liability is the same, and it is very manifest that the legislature intended to make it so. It was the object of the legislature in the passage of this statute to avoid the decisions of this Court, by which, before the passage of the Act, the law by construction was made to relieve the municipality from all liability of this kind, and we think the statute should be so construed as to effect the object intended by the legislature.

Id. at 460 (emphasis added). In short, the liability statute construed by *Joslyn* imposed an actionable duty to keep a highway reasonably safe for travel. This duty was separate from the duty to repair a highway. It was critical to the *Joslyn* Court's opinion that this additional duty of keeping a highway safe existed. This was important because the defect alleged—a pile of sand in the street—did not arise from the City's failure to **repair** the highway. The Court was able to conclude, however, that the pile of sand did arise from the City's failure to keep its streets reasonably safe for travel. *Id.* at 460-461.

Viewing *Joslyn* in this context, the flaw in the Court of Appeals' reasoning is apparent. This Court has determined that MCL 691.1402 does **not** impose a separate duty on a road commission to keep its highways reasonably safe for travel. *Nawrocki*, 463 Mich at 160. To the

contrary, the duty is limited to the repair and maintenance of the physical structure of the roadbed surface. *Id.* at 160, 183. Therefore, *Joslyn,* viewed properly, actually supports the grant of summary disposition to the Road Commission in this case.

II. THE OAKLAND COUNTY ROAD COMMISSION SHOULD HAVE RECEIVED SUMMARY DISPOSITION ON THE BASIS THAT THE ACTUAL OR CONSTRUCTIVE KNOWLEDGE REQUIREMENTS OF MCL 691.1403 WERE NOT SATISFIED.

The Road Commission should have received summary disposition because the type of evidence relied upon by the plaintiffs to show actual or constructive knowledge, as required by MCL 691.1403, cannot satisfy the requirements of the statute. Absent concrete facts demonstrating that a road commission had actual or constructive knowledge of (1) the specific defect, and (2) that the defect rendered the roadway not reasonably safe for travel, combined with a reasonable time to repair, there can be no liability pursuant to MCL 691.1402.

A. The Highway Exception of § 1402 and the Knowledge and Reasonable Time to Repair Requirements of § 1403.

The highway exception, MCL 691.1402, is tempered by the knowledge and reasonable time to repair requirements of MCL 691.1403:

> Sec. 3. No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.

Id.

This Court has recently elaborated on the strict limitations imposed by §§ .1402-.1403. In *Wilson* v *Alpena Co Rd Comm*, 474 Mich 161; 713 NW2d 717 (2006), this Court addressed "what notice of a defect in a road the governmental agency responsible for road maintenance and

repair must have before it can be held liable for damage or injury incurred because of the defect." *Id.* at 162. In the process, its discussion went beyond the mere "notice" issue by significantly clarifying the precise combination of circumstances that must be shown by a plaintiff before a county road commission may be held liable for a highway defect.

Underlying this Court's decision was a bicycle accident which occurred on a paved road in Alpena County. According to the plaintiff, Diane Wilson, she had to "snake" her way through "innumerable potholes" in the road. *Id* at 163. Her Complaint alleged that the road "had potholes in excess of six inches deep that had existed more than 30 days at the time of her accident . . ." *Id.* at 164. Plaintiff also argued that the road had "for years been in a condition that was dangerous to public safety because it was persistently potholed and rutted and only full resurfacing could make it safe." *Id.*

The Road Commission moved for summary disposition asserting governmental immunity because, among other reasons, it lacked notice of a defective road so as to satisfy MCL 691.1403. The Road Commission pointed out that a road crew had "cold patched" the road two weeks before the plaintiff's accident and that it had received no complaints after the cold patching. *Id.* at 165. The plaintiff responded that the deteriorated condition of the road should be enough by itself to satisfy the notice requirement. *Id.*

In Section 3 of its Opinion, this Court summarized the state of highway exception jurisprudence. This Court wrote:

> Hence, the Legislature has not waived immunity if the repair is reasonable but the road is nonetheless still not reasonably safe because of some other reason.
>
> Viewing the GTLA as a whole, it can also be seen that the converse of this statement is true: that is, the Legislature has not waived immunity where the maintenance is allegedly unreasonable but the road is still reasonably safe for public travel.

Id. at 167-168. This Court further elaborated that pursuant to MCL 691.1403, immunity is not waived unless the governmental agency had actual or constructive notice of "the defect" before the accident occurred. To determine what constitutes a "defect" under the Act, "our inquiry is again informed by the 'reasonably safe and convenient for public travel' language of MCL 691.1402(1)." *Id.* at 168. Stated differently, "an *imperfection* in the roadway will only rise to the level of a compensable 'defect' when that imperfection is one which renders a highway not 'reasonably safe and convenient for public travel,' and the government agency is on notice of that fact." *Id.* at 168.

If the agency knows, or should have known, of the existence of the defect or condition that makes the road not reasonably safe for public travel, it has only a reasonable time to repair it. If it does not repair the defect within a reasonable time, it can be held liable for injury or damage caused by that defect. *Id.* at 169.

In *Wilson*, this Court noted that all parties conceded "that there was notice of certain problems – that the road was bumpy and required frequent patching," but nevertheless concluded that "these problems do not invariably lead to the conclusion that the road was not reasonably safe for public travel." *Id.* at 169. This Court conceded that a road could possibly be "so bumpy" that it is not reasonably safe for public travel, "but to prove her case plaintiff must present evidence that a reasonable road commission, aware of this particular condition, would have understood it posed an unreasonable threat to safe public travel and would have addressed it." This Court cited *Jones* v *Detroit*, 171 Mich 608; 137 NW 513 (1912), where this Court had long ago adopted the eminently reasonable, common sense notion that a road in bad repair, or with rough pavement, is not per se one that is not reasonably safe for travel. As observed by the *Jones* court, and repeated in *Wilson*, "[n]early all highways have more or less rough and uneven

places in them, over which it is unpleasant to ride; but because they have, it does not follow that they are unfit and unsafe for travel." *Jones*, 171 Mich at 611.

Very recently, this Court elaborated further upon the MCL 691.1403 requirement in *Whitmore v Charlevoix Co Rd Comm*, 490 Mich 964; 806 NW2d 307 (2011). There, the plaintiffs had been injured in a motorcycle crash that they claimed was the result of their motorcycle coming into contact with several potholes in the highway surface. To establish the actual or constructive knowledge requirements of MCL 691.1403, the plaintiffs pointed to evidence showing only that the Road Commission may have known that potholes had developed on that road in the past, and that the road surface was scheduled to be replaced in the future. In other words, the plaintiffs did not produce evidence to show that the Road Commission had actual or constructive knowledge of the single, specific defect alleged to have caused the plaintiff's crash. Rather, the plaintiffs pointed only to evidence suggesting that the Road Commission had knowledge that at some unspecified times in the past, potholes had formed somewhere along that roadway, and that the roadway was scheduled for routine maintenance and repair.

This Court, after hearing oral argument on whether to grant the Road Commissions' Application for Leave to Appeal, offered the following clarifying insights as to the § 1403 requirement:

> We clarify that plaintiffs did not properly plead *actual* knowledge of the *particular* defect that caused their injuries because they only alleged that defendant knew of general problems with the highway that required frequent patching and that defendant scheduled reconstruction of the highway. *Wilson*, 474 Mich at 169, 713 NW2d 717. The Court of Appeals erred to the extent that its rationale was inconsistent with *Wilson*.

Whitmore, 490 Mich at 964-965 (emphases in original).

B. The Historical Underpinnings of the Actual or Constructive Knowledge Requirement.

The concept that a governmental defendant can be held liable in tort arising from a highway defect only where there was prior knowledge of the defect has existed from almost the inception of highway liability. As recounted in his often-cited law review article, Professor Cooperrider observed that the first Michigan case to imply a possible public liability for "nonrepair of public facilities" was *Dewey v City of Detroit*, 15 Mich 307 (1867). Cooperrider, Luke K., *The Court, The Legislature, and Governmental Tort Liability In Michigan*, 72 Mich L R 187, 193 (1973). **(Exhibit 7).** In *Dewey*, the plaintiff had tripped over a loose plank in a city sidewalk. The trial court instructed the jury that "the city would be liable only if it had had notice of the defect and that notice might be inferred if the defect were open and notorious, or of longstanding and of such character that it would naturally arrest the attention of persons passing by." Cooperrider, *supra*, at 193 **(Exhibit 7).** Justice Campbell, writing for the majority of the Supreme Court, approved the jury's instruction, deflecting plaintiff's counsel's contention that the notice requirement was too restrictive with the observation that "sidewalk repairs were required by the city charter to be made under the supervision of street commissioners, that there were only two commissioners for the entire city, and that, as a practical matter, the commissioners could not be expected to be aware of defects that were not apparent to every ordinary observer, since the walks in a city the size of Detroit covered 'many scores, and probably several hundreds of miles.'" *Id.* at 193-194. In short, the concept that public liability in connection with alleged highway defects can only arise where the governmental entity has sufficient prior notice of the defect is a staple of immunity jurisprudence in Michigan.

Similarly, in one of the earliest iterations of the statutory highway exception to governmental immunity, the May 29, 1879 enactment of Public Act No. 244, section 4 made all

actions brought pursuant to the statute subject "to the proviso that 'it must be shown that such township, village, city, or corporation has had reasonable time and opporutnity after such highway, street, crosswalk or culvert became unsafe or unfit for travel, to put the same in the proper condition for use, and has not used reasonable diligence therein.'" *Id.* at 206 **(Exhibit 7)**.

Thus, regardless of whether public highway liability was at the time a creature of common law or statute, the concept of prior notice and failure to act reasonably given that notice has always been prerequisite.

C. Recent Court of Appeals Authority Construing MCL 691.1403.

Recently, the Court of Appeals issued an unpublished decision applying MCL 691.1403 to a factual scenario similar to the one presented here. In *Kurzer v Oakland Co Rd Comm*, unpublished opinion per curiam of the Court of Appeals, issued February 8, 2011 (Docket No. 295412) **(Exhibit 8)**, the Court of Appeals reversed a trial court determination that there was a genuine issue of fact concerning the requirements of MCL 691.1403. Plaintiff Charles Kurzer was injured following a motorcycle accident. He alleged that the accident "occurred as a result . . . of numerous large potholes within the traveled portion of the highway[.]" *Id.* at *1. **(Exhibit 8)**. The Road Commission sought summary disposition in part based on its argument that *Kurzer* had failed to demonstrate that the Road Commission had notice of the allegedly defective condition, and that Kurzer had not provided sufficient evidentiary support for the allegation that the roadway at issue was not reasonably safe for public travel. Kurzer had testified at his deposition that he was "on his motorcycle when the front tire jerked downward, causing him to lose his grip on the handlebars and fall." *Id.* at *2. He testified that a pothole precipitated the accident, but that he never saw the pothole. *Id.* at *2. His evidence consisted of photographs of the roadway depicting an "obviously rough road." *Id.* at *2.

Upon examining the photographs, however, the Court of Appeals concluded that they did not "reveal any part of the roadway that is so defective to make it not reasonably safe and convenient for public travel." *Id.* at *2. Additionally, even if the plaintiff had offered sufficient evidence to identify an actionable road defect, the Court concluded that it was nothing more than pure speculation and conjecture that the Road Commission had actual or constructive notice of the alleged defect. *Id.* at *2. Although there was evidence that "the road was in poor condition over a period of time, making for a generally bumpy ride," the Court determined that "notice of a general bumpy condition is not the equivalent of notice of a specific pothole of such dimensions that would render the roadway unsafe or inconvenient for public travel." *Id.* at *2.

D. Analysis

The evidence relied upon by the plaintiffs in this case to demonstrate actual or constructive knowledge and reasonable time to repair, as recounted by the Court of Appeals in its unpublished decision, consisted of testimony from a resident of the area where the accident occurred that "he repeatedly observed defendants' trucks leaving gravel on the roadway when they graded the shoulder on a monthly basis," and that he had "contacted defendant by telephone on at least five occasions regarding the gravel and that he once stopped one of the trucks performing the gradee--grading to advise the driver that he had left gravel at the intersection of the roads, and to inform him that it was causing accidents." *Paletta v Oakland Co Rd Comm*, unpublished opinion per curiam of the Court of Appeals, issued July 21, 2011 (Docket No. 298238). The Court of Appeals concluded that based on this evidence, there was an issue of fact concerning whether the Road Commission had actual or constructive knowledge of the alleged defect in reasonable time to repair before the plaintiffs' accident.

The error committed by the Court of Appeals is identical to the error addressed by this Court in *Whitmore*. In determining that there was sufficient evidence to create an issue of fact

about the § 1403 requirement, the Court of Appeals relied upon very general testimony of a local resident that at unspecified times in the past, he had observed Road Commission vehicles leaving gravel on the roadway during shoulder grading operations, and that he had on unspecified occasions in the past contacted the Road Commission and informed them that there was gravel on the road that in the resident's view, posed a threat to travel. None of this evidence relates to the specific accident in which the plaintiffs were involved. As in *Whitmore*, for the actual or constructive knowledge requirements of § 1403 to have real meaning, the actual or constructive knowledge must be of a specific defect that caused the plaintiff's injury. It cannot be generalized knowledge that a roadway has had surface defects in the past, nor can it be evidence that the Road Commission has been informed of and has corrected surface defects in the past. To the contrary, the statute contemplates a single, specific defect that causes the plaintiff's injury. Any other construction of the statute would render meaningless the requirement that a road commission have a reasonable amount of time after gaining actual or constructive knowledge, but prior to the plaintiff's injuries, in which to repair the defect.

Simply put, in relying upon generalized knowledge of past defects to satisfy the § 1403 actual or constructive knowledge requirements, the Court of Appeals in the instant case committed the same error that was addressed, and corrected, by this Court recently in *Whitmore*. As clarified by this Court, the statute requires that a plaintiff demonstrate that the road commission had actual or constructive knowledge of the specific defect that was alleged to cause the crash.

In the instant case, the evidence presented by the plaintiffs, and relied upon by the Court of Appeals, was not evidence of the specific defect that allegedly caused the plaintiffs' injury. Rather, it was evidence that similar defects had existed on the highway surface at some

unspecified time period in the past. As a matter of law, this type of evidence is insufficient to satisfy the statutory criteria, and the Road Commission should have been given summary disposition on that basis.

RELIEF REQUESTED

WHEREFORE, for the foregoing reasons and authorities, *Amicus Curiae* Michigan County Road Commission Self-Insurance Pool respectfully requests that this Court reverse the decision of the Court of Appeals, and thereby order that summary disposition be granted in favor of the defendant-appellant Oakland County Road Commission. *Amicus Curiae* Michigan County Road Commission Self-Insurance Pool respectfully requests any additional relief deemed necessary.

DATED: March 28, 2012

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Not Reported in N.W.2d, 2007 WL 1229448 (Mich.App.)
(Cite as: 2007 WL 1229448 (Mich.App.))

Court of Appeals of Michigan.
Gerald BURTON, Plaintiff-Appellee,
v.
WATERFORD TOWNSHIP, Defendant-Appellant.

Docket No. **274332**.
April 26, 2007.

Oakland Circuit Court; LC No.2006-073293-NO.

Before: CAVANAGH, P.J., and JANSEN and BORRELLO, JJ.

PER CURIAM.

***1** Defendant appeals as of right the circuit court order denying its motion for summary disposition on the basis of on governmental immunity. We reverse and remand for entry of judgment in favor of defendant. This appeal is being decided without oral argument. MCR 7.214(E).

Plaintiff lost control of his bicycle when the tires slipped on mud or algae that had accumulated on a sidewalk under a large puddle of standing water. According to plaintiff's expert, the sidewalk was defective because it was not "pitched" so that water would run off the sidewalk and onto the adjacent grassy area. Instead, there was a low-lying depression in the sidewalk where water and muck could accumulate because of the inadequate drainage. The circuit court ruled that there was an issue of fact concerning whether the sidewalk was defective.

The circuit court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v. Davidson,* 241 Mich.App 611, 616; 617 NW2d 351 (2000). "The applicability of governmental immunity is a question of law that is also reviewed de novo on appeal." *Martin v. Rapid Inter-Urban Transit Partnership,* 271 Mich.App 492, 496; 722 NW2d 262 (2006).

A governmental agency having jurisdiction over a highway is liable in tort for breach of the duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). The term "highway" is defined to include sidewalks. MCL 691.1401(e). A governmental entity owes the duty to keep a highway in reasonable repair; however, there is no duty to keep a highway reasonably safe. *Nawrocki v. Macomb Co Rd Comm,* 463 Mich. 143, 160; 615 NW2d 702 (2000).

Defendant contends that this case is controlled by *Haliw v. Sterling Hts,* 464 Mich. 297; 627 NW2d 581 (2001), and that because there was no evidence that the defect in the sidewalk itself caused plaintiff's injury, the highway exception to governmental immunity does not apply. We agree. In *Haliw,* the plaintiff slipped and fell on a patch of ice that had formed in a depression in the sidewalk. *Id.* at 299. Although the precise issue before the Court was the application of the natural accumulation rule, the Court stated that to recover under the highway exception, the plaintiff was required show that her injuries were proximately caused by a defect in the sidewalk itself or by a combination of that defect and the accumulation, as opposed to by the accumulation alone. *Id.* at 308-311. The Court explained that there must be a "persistent defect" in the sidewalk that renders it "unsafe for public travel at all times, and which combines with the natural accumulation of ice or snow to proximately cause injury" in order for a municipality to be held liable. *Id.* at 312. If the plaintiff's "injury is due solely to the presence of ice on the sidewalk," the municipality is not liable, "even if a depression in the sidewalk caused the accumulation." *Id.* at 311 n 11.

***2** Under *Haliw,* it is insufficient for a plaintiff

to show that his or her injuries were caused by the presence of an accumulated substance on the sidewalk, even if that accumulation was itself occasioned by a depression in the sidewalk. Regardless whether the natural accumulation doctrine precisely extends to water and mud, *Haliw* provides that a plaintiff must prove that his or her injuries resulted directly, rather than indirectly, from a "persistent defect" inherent in the structure of the sidewalk itself.

In the present case, there was no "persistent defect" in the sidewalk that rendered it "unsafe for public travel at all times." *Id.* at 312. Instead, it was merely demonstrated that an accumulation of water and mud had collected in or around a sidewalk depression, and that the water and mud caused plaintiff's accident. In other words, while the depression may have indirectly led to the accident, reasonable minds could not conclude that a structural defect itself was the direct cause of plaintiff's injuries. Simply put, because there was no showing that the depression in the sidewalk was a "persistent defect" that directly caused plaintiff's injuries, summary disposition should have been granted in favor of defendant on the basis of governmental immunity. *Id.* at 311-312.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

Mich.App.,2007.
Burton v. Waterford Tp.
Not Reported in N.W.2d, 2007 WL 1229448 (Mich.App.)

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Westlaw

Not Reported in N.W.2d, 2005 WL 857243 (Mich.App.)
(Cite as: 2005 WL 857243 (Mich.App.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Dale Andrew ULRICH, Vicki Sue Ulrich, and Kyle Robert Ulrich, Plaintiffs-Appellees,
v.
DEPARTMENT OF TRANSPORTATION, Defendant-Appellant.

No. **252525**.
April 14, 2005.

Before: CAVANAGH, P.J., and JANSEN and GAGE, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Defendant appeals as of right an order denying its motion for summary disposition on the ground of governmental immunity, MCL 691.1402(1). We reverse and remand.

Plaintiffs' claim arises from a one-car accident that they averred was caused by defendant's failure to "maintain the freeway in reasonable, safe repair so that it is reasonably safe and convenient for public travel." Specifically, vegetation and dirt accumulated along the shoulder of the highway allowed water to pool on the traveled portion which caused their vehicle to hydroplane out of control. The issue is whether these conditions fall within the highway exception to governmental immunity, MCL 691.1402(1).

In *Nawrocki v. Macomb Co Rd Comm,* 463 Mich. 143, 160, 161-162; 615 NW2d 702 (2000), our Supreme Court held that, under the highway exception, a governmental agency has a duty to keep the "improved portion of the highway designed for vehicular travel" in reasonable repair, i.e., suitable for vehicle travel. In *Gregg v. State Hwy Dept,* 435 Mich. 307, 314-316; 458 NW2d 619 (1990), it was determined that the shoulder of a roadway is an "improved portion of the highway designed for vehicular travel." See, also, *Soule v Macomb Co Bd of Rd Comm'rs,* 196 Mich.App 235, 237; 492 NW2d 783 (1992). However, the highway exception does not impose a duty on governmental agencies to ensure that the highway is *designed* for safe travel. See *Hanson v. Mecosta Co Rd Comm'rs,* 465 Mich. 492, 503-504; 638 NW2d 396 (2002).

Here, plaintiffs averred that lax maintenance-"not mowing, cutting or digging away the growth [of] vegetation on the roadbed, together with accumulated sand and gravel debris"-allowed vegetation and debris near the edge of the road surface to create a drainage barrier, which caused water to pool on the roadway. But, this theory of liability is not premised on an actual road defect, it is premised on a claimed design defect that allowed water to collect. The allegedly dangerous and defective condition that caused plaintiffs' damages was the accumulation of water on the roadway, not a defect in the roadbed itself. Water on the roadway is a design issue because it is controlled by design factors, such as the elevation of the road and its substructure, the graded angle of the road surface, the width of the shoulder (which determines how closely vegetation will grow near the paved surface), and how much rainfall per hour the road is designed to handle. Accordingly, the highway exception to governmental immunity is inapplicable and plaintiffs' claim was properly dismissed.

Reversed and remanded for entry of an order granting defendant's motion for summary disposition. We do not retain jurisdiction.

Mich.App.,2005.
Ulrich v. Department of Transp.
Not Reported in N.W.2d, 2005 WL 857243 (Mich.App.)

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Westlaw

Not Reported in N.W.2d, 2005 WL 2045953 (Mich.App.)
(Cite as: 2005 WL 2045953 (Mich.App.))

C
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Aloma WATLEY, Plaintiff-Appellant,
v.
CITY OF DETROIT, Defendant-Appellee.

No. **260510**.
Aug. 25, 2005.

Before: ZAHRA, P.J., and GAGE and MURRAY, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10). [FN1] We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

> FN1. Defendant also filed a motion for summary disposition pursuant to MCR 2.116(C)(8). However, because both parties submitted documentary evidence that is not relevant to a motion brought under MCR 2.116(C)(8), but is relevant to a motion brought under MCR 2.116(C)(7) and MCR 2.116(C)(10), and the trial court considered documentary evidence in ruling on defendant's motion, we will analyze the motion under MCR 2.116(C)(7) and MCR 2.116(C)(10).

Plaintiff's sole issue on appeal is that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10) because issues of material fact existed regarding whether a defective condition existed in the sidewalk and regarding whether the broken water pipe constituted a nuisance per se.

The decision to grant or deny summary disposition is reviewed de novo on appeal. MCR 2.116(C)(7); *Iovino v. State,* 228 Mich.App 125, 131; 577 NW2d 193 (1998). In deciding a motion for summary disposition based on governmental immunity, this Court must consider any supporting evidence submitted by the parties, including affidavits, depositions, and admissions, to determine whether the claim is barred by immunity granted by law. This Court must review the pleadings and documentary evidence to determine whether the nonmoving party established an exception to governmental immunity. MCR 2.116(C)(7); *McGoldrick v. Holiday Amusements, Inc,* 242 Mich.App 286, 289-290; 618 NW2d 98 (2000). This Court must accept all well-pleaded allegations as true and consider them in the light most favorable to the nonmoving party and determine whether the defendant is entitled to judgment as a matter of law. MCR 2.116(C)(7); *Iovino, supra.* In reviewing a motion for summary disposition under MCR 2.116(C)(10), summary disposition may be granted if a review of the evidence demonstrates that there is no genuine issue of material fact and the nonmoving party is entitled to a judgment as a matter of law. *Quinto v. Cross & Peters Co,* 451 Mich. 358, 362; 547 NW2d 314 (1996).

Generally, government agencies have broad immunity from tort liability when they are engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Iovino, supra.* There are five statutory exceptions to governmental immunity. Among these exceptions is the highway exception. MCL 691.1402; *Nawrocki v. Macomb Co Road Comm,* 463 Mich. 143, 156; 615 NW2d 702 (2000). Under the highway exception, a governmental agency having jurisdiction over a highway is liable in tort for breach of the duty to "maintain the highway in reasonable repair so that it is reas-

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onably safe and convenient for public travel." MCL 691.1402(1); *Nawrocki, supra,* at 157. The highway exception imposes a duty of reasonable repair and maintenance, but does not impose a secondary duty to keep a highway reasonably safe. *Weakley v. Dearborn Heights,* 246 Mich.App 322, 328; 632 NW2d 177 (2001). The term highway includes sidewalks. MCL 691.1401(e); *Haaksma v. City of Grand Rapids,* 247 Mich.App 44, 53; 634 NW2d 390 (2001).

Plaintiff alleged no deficiency in the sidewalk requiring repair, and testified that the water on the ground emitting from the broken pipe in the water stop box caused her to fall. She further testified that she slipped in a mixture of water and mud caused by water leaking from the broken pipe in the water stop box. The mud and water was located on the sidewalk at the time of the incident. The record indicates that there is no evidence that plaintiff's injuries were proximately caused by a defect in the sidewalk that was in need of repair. Instead, plaintiff's testimony established that her injuries were caused by slipping in the water and mud mixture caused by the broken pipe in the water stop box. Therefore, plaintiff has failed to establish that defendant breached its duty to maintain the sidewalk in reasonable repair.

***2** Plaintiff contends that an expert's affidavit established that the sidewalk was defective. However, plaintiff testified that, although the sidewalk "wasn't in good condition," it did not provide a hazard for anyone to trip and fall. Plaintiff further testified that the sidewalk had a "little crack" in it and that it was a "little uneven," but was not such that anyone would normally trip and fall over it. Plaintiff's phone calls to the city were regarding the faulty water stop box and not a defect in the sidewalk. There is no genuine issue of material fact regarding whether defendant breached its duty to maintain the sidewalk at issue in reasonable repair. Therefore, the trial court did not err in granting defendant's summary disposition motion.

Plaintiff further contends that the broken pipe in the water stop box constituted a nuisance per se. Whether there exists a nuisance per se exception to governmental immunity is an unresolved question. *Haaksma, supra* at 56. However, even assuming for the sake of argument that nuisance per se is a recognized exception, plaintiff has failed to present facts amounting to a nuisance per se. A nuisance per se is an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained. *Id.* A nuisance per se must be unreasonable by its nature rather than predicated on a lack of care. *McDowell v. Detroit,* 264 Mich.App 337, 347; 690 NW2d 513 (2004).

We cannot conclude that a broken pipe in a water stop box is dangerous at all times and under all circumstances, without regard to the care with which it is conducted or maintained. Plaintiff was injured when a broken water stop box leaked water onto the sidewalk in front of her residence causing an accumulation of mud and water. The transport and distribution of water serves a "innumerable valuable public purpose and can be conducted in a manner so as not to pose any nuisance whatsoever." *McDowell, supra* at 348. Plaintiff contends that the "unabated cycle of flowing water from the stop box constituted a nuisance per se at all times during the period of time that it was free flowing." However, the test for nuisance per se is not whether the condition is a nuisance per se over a specified period of time; rather, the test is whether the condition is a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained. *Haaksma, supra.* A water stop box is not a nuisance at all times and under all circumstances. Therefore, the trial court properly granted defendant's motion for summary disposition with respect to plaintiff's nuisance per se claim.

Affirmed.

Mich.App.,2005.
Watley v. City of Detroit
Not Reported in N.W.2d, 2005 WL 2045953 (Mich.App.)

Not Reported in N.W.2d, 2005 WL 2045953 (Mich.App.)
(Cite as: 2005 WL 2045953 (Mich.App.))

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Not Reported in N.W.2d, 2003 WL 1880119 (Mich.App.)
(Cite as: 2003 WL 1880119 (Mich.App.))

Court of Appeals of Michigan.
Vannalky SONSYNATH,[FN1] Personal Representative of the Estate of Souvanny Phongphila, Deceased, Plaintiff-Appellee,

FN1. The record spells the personal representative's first name as "Vannaly."

v.
DEPARTMENT OF TRANSPORTATION, Defendant-Appellant.

No. **233768**.
April 15, 2003.

Before: TALBOT, P.J., and SAWYER and O'CONNELL, JJ.

[UNPUBLISHED]
PER CURIAM.

***1** Defendant appeals as of right from a judgment awarding plaintiff $12,700,100, following a bench trial. We reverse.

This action arises from a fatal automobile accident that occurred during the early morning hours of June 22, 1996, along I-94 at Wadhams Road in St. Clair County. The accident allegedly occurred when the decedent's vehicle encountered a five to six inch current of water on the roadway, causing it to hydroplane off the road and turn upside down into a water-filled ditch. Plaintiff alleged below that she was not predicating liability on defendant's failure to design an adequate drainage system. Rather, plaintiff sought to hold defendant liable under the highway exception to governmental immunity, M.C.L. § 691.1402(1), on the basis that the water over the roadway occurred because of a flash flood, which defendant should have both discovered and taken precautions to protect against possible harm to motorists; for example, by warning motorists of the hazard, closing the road, or detouring traffic around the area.

Following a bench trial, the court found no evidence that the decedent was operating his automobile negligently, and further found that he could not have avoided the unexpected accumulation of water on the roadway. Relying on *Pick v. Szymczak,* 451 Mich. 607; 548 NW2d 603 (1996), the court found that defendant had a duty to place adequate warning signs at the particular point of special danger in the roadway. It also found that defendant was negligent in failing to act on storm warnings and other indications of possible severe flooding, and did not employ its road operations in a timely fashion to discover the danger and protect the decedent from it. Additionally, the court determined that the "natural accumulation doctrine" was not applicable to this case because the amount of flooding was so unusual. The court found that the decedent would not have died had defendant acted appropriately to safeguard public travel.

The trial court subsequently reexamined its decision in light of *Nawrocki v. Macomb Co Rd Comm,* 463 Mich. 143; 615 NW2d 702 (2000), and determined that, because the defect in the instant case involved the roadbed itself, *Nawrocki* was not implicated. This appeal followed.

Defendant argues that the trial court erred in determining that plaintiff's action was viable under the highway exception to governmental immunity. We agree.

At the time this action arose, M.C.L. § 691.1402,[FN2] the highway exception to governmental immunity provided in pertinent part:

FN2. MCL 691.1402 was amended by

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> 1999 PA 205, effective December 21, 1999. Because plaintiff's accident occurred on June 22, 1996, we apply the version of the statute in effect before the amendment was made.

Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

***2** In *Pick, supra,* our Supreme Court held that the duty to maintain a highway in reasonable repair included the duty to erect warning signs or traffic control devices at a "point of hazard" or a "point of special danger." A "point of hazard" or a "point of special danger" was deemed to be a condition that directly affected vehicular travel on the improved portion of the roadway so that travel was not reasonably safe. *Id.* at 621. In *Nawrocki,* however, the Supreme Court overruled *Pick,* and held that the highway exception did not contemplate conditions arising from points of hazard or special danger outside the actual roadbed designed for vehicular travel. The Court held that state and county road commissions have no duty under the highway exception to install, repair, maintain, or improve traffic control devices, including signs and lighting. *Nawrocki, supra* at 179-184.

Subsequently, in *Hanson v. Mecosta Co Rd Comm'rs,* 465 Mich. 492; 638 NW2d 396 (2002), the Supreme Court limited the scope of the highway exception even further. In that case, the plaintiff argued that a section of highway was unsafe because of limited sight distance caused by the curvature of a hill. Several of the plaintiff's claims were predicated on the road commission's failure to adequately warn or inform the public of the danger through the placement of warning signs. *Id.* at 498. The Court reiterated its previous holding in *Nawrocki* that the placement of warning signs was not within the purview of the highway exception. *Id.* at 499. The Court also rejected the plaintiff's claims concerning the defendant road commission's failure to redesign the roadway to eliminate the dangerous condition, concluding that the plain language of the highway exception provides for a duty to repair and maintain, but not a duty to design or redesign a road to eliminate points of hazard or to fix other "design defects." *Id.* at 500, 503-504.

Applying *Nawrocki* and *Hanson,* we conclude that plaintiff's action clearly is not viable under the highway exception to governmental immunity. Plaintiff maintains that *Nawrocki* is not controlling because the defective condition involved the accumulation of water on the roadway itself, rather than an off-road condition. However, plaintiff's theory of liability is not based on an actual defect in the roadbed itself, but rather on an alleged design defect, coupled with the excessive rainfall and defendant's failure to warn about the hazardous condition. Failure to warn or place signage does not concern a failure to maintain "the actual physical structure of the roadbed surface" and, thus, does not fall within the highway exception. *Nawrocki, supra* at 183. Likewise, *Hanson* precludes any claim arising from the design of the surface or surrounding area that allowed the flooded condition to occur.

Plaintiff argues that *Nawrocki* does not address a "flood-on-the-roadway situation," such as that involved here, and maintains that the Court provided no indication that it intended to overrule prior cases that treated water, snow, or ice on the roadway as a dangerous condition within the maintenance duty of the highway exception. Although plaintiff relies on *Peters v. State Hwy Dep't,* 400 Mich. 50, 57; 252 NW2d 799 (1977),[FN3] in support of her argument that water on the roadway constitutes a dangerous condition within the maintenance duty of M.C.L. § 691.1402(1), the Supreme Court abrogated *Peters* in its decision in *Hanson,* specifically rejecting the idea in *Peters* that the duty to maintain a roadway

in a reasonably safe condition includes the duty to correct defects arising from the original design or construction of the highway. *Hanson, supra* at 501, n. 7. Therefore, upon considering plaintiff's action in light of *Nawrocki* and *Hanson,*[FN4] we conclude that the trial court erred in holding that defendant had a duty either to place signage to warn about the hazardous condition caused by the water on the roadway, or to correct any design defect that allowed the water to gather. Accordingly, we reverse the judgment for plaintiff.

FN3. *Peters* involved a fatal automobile accident similar to the accident that occurred here, wherein the question presented was whether the state knew or should have known that a highway drainage system was inadequately designed or constructed to handle a not unusual rainfall.

FN4. Although *Hanson* was decided after the trial court decided the present case, we conclude that it applies retroactively. In *Adams v. Dep't of Transportation,* 253 Mich.App 431; 655 NW2d 625 (2002), a special panel of this Court resolved a conflict between *Adams v. Dep't of Transportation,* 251 Mich.App 801; 651 NW2d 88 (2002), vacated 251 Mich.App 801 (2002), and *Sekulov v. City of Warren,* 251 Mich.App 333, 339; 650 NW2d 397 (2002) , and held that *Nawrocki* should be given full retroactive effect. The Court concluded that, in overruling *Pick,* the Supreme Court in *Nawrocki* did not overrule clear and uncontradicted case law in order to establish a new legal principle, but rather properly interpreted the highway exception to governmental immunity. *Adams, supra,* 253 Mich.App at 439-440. In *Adams,* the Court also vacated its earlier decision in *Sekulov,* which had held that *Hanson* applied prospectively only. *Adams, supra,* 253 Mich.App at 433. Thus, we conclude that *Nawrocki* and *Hanson* are both applicable to this case.

*3 In light of our decision to reverse, we need not consider defendant's remaining issues.

Reversed.

Mich.App.,2003.
Sonsynath v. Department of Transp.
Not Reported in N.W.2d, 2003 WL 1880119 (Mich.App.)

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Westlaw

Not Reported in N.W.2d, 2004 WL 316400 (Mich.App.)
(Cite as: 2004 WL 316400 (Mich.App.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Tonya M. BALLARD, Plaintiff-Appellant,
v.
CLINTON COUNTY ROAD COMMISSION, Defendant-Appellee.

No. **244130**.
Feb. 19, 2004.

Before: SCHUETTE, P.J., and METER and OWENS, JJ.

[UNPUBLISHED]
SCHUETTE, METER and OWENS, JJ.
MEMORANDUM.

***1** Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Plaintiff sustained injuries when she lost control of her vehicle after it hydroplaned on several inches of water that covered DeWitt Road. She filed suit alleging that defendant breached its duty to maintain the highway in reasonable repair by failing to repair and maintain the drainage system so that water did not accumulate on the improved portion of the highway. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), finding that defendant's duty to repair and maintain the highway was restricted to the improved portion of the highway designed for public travel and did not extend to the culverts that were not on that portion of the highway.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v. Burchell,* 249 Mich.App 468, 479; 642 NW2d 406 (2001).

III. ANALYSIS

Generally, a governmental agency is immune from tort liability for actions taken in furtherance of a governmental function. MCL 691 .1407. The highway exception to immunity requires a governmental agency having jurisdiction over a highway to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). The definition of "highway" includes "bridges, sidewalks, trailways, crosswalks, and culverts on the highway." MCL 691.1401(e). MCL 691.1402(1) imposes duties and liability on state and county road commissions only for the traveled portion, paved or unpaved, of a highway actually designed for public travel, and not for installations outside the improved portion of the highway. *Nawrocki v. Macomb County Rd Comm,* 463 Mich. 143, 180; 615 NW2d 702 (2000). Determination of the applicability of the highway exception is a question of law. *Meeks v. Dep't of Transportation,* 240 Mich.App 105, 110; 610 NW2d 250 (2000).

Plaintiff asserts that defendant was required to repair and maintain a culvert, an installation outside the improved portion of the highway. However, the plain language of MCL 691.1402(1), states that the duty of a state or county road commission to repair and maintain a highway extends only to the "improved portion of the highway designed for vehicular travel" and does not extend to any "installation outside of the improved portion of the highway designed for vehicular travel." A state or county road commission is liable under the highway exception only if it fails to repair or maintain "the actual physical structure of the roadbed surface, paved or unpaved, designed for vehicular travel." *Nawrocki, supra,* 183; see also *Soule v Macomb County Bd of Rd Comm'rs,* 196 Mich.App

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235, 237-238; 492 NW2d 783 (1992). Neither a culvert nor water standing on the road constitutes part of the physical structure of the roadbed designed for public travel. MCL 691.1402(1). The trial court correctly held that the highway exception operated to preclude liability in this case. *Meeks, supra; Nawrocki, supra.*

***2** Affirmed.

Mich.App.,2004.
Ballard v. Clinton County Road Com'n
Not Reported in N.W.2d, 2004 WL 316400 (Mich.App.)

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Not Reported in N.W.2d, 2004 WL 435386 (Mich.App.)
(Cite as: 2004 WL 435386 (Mich.App.))

Court of Appeals of Michigan.
Tina CALAMITA, Plaintiff-Appellee,
v.
CITY OF ST. CLAIR SHORES, Defendant-Appellant/Third Party Plaintiff,
and
J J & C, INC., Defendant-Appellee/Third Party Defendant.

No. **236755**.
March 9, 2004.

Before: METER, P.J., and JANSEN and TALBOT, JJ.

[UNPUBLISHED]

PER CURIAM.

ON REMAND

***1** This case is before us for the second time on remand from our Supreme Court. *Calamita v. City of St. Clair Shores,* 469 Mich. 893; 669 NW2d 812 (2003). Initially we reviewed this case pursuant to an order from our Supreme Court granting defendant city of St. Clair Shores' [FN1] interlocutory appeal of an order denying its motion for summary disposition under MCR 2.116(C)(7) and (10). *Calamita v. City of St Clair Shores,* 465 Mich. 871; 661 NW2d 578 (2001). We concluded that a genuine issue of material fact was raised with regard to whether a sidewalk was reasonably safe and convenient for public travel. *Calamita v. City of St Clair Shores,* unpublished opinion per curiam of the Court of Appeals (Docket No. **236755**, issued March 18, 2003).

FN1. St. Clair Shores will be referred to as defendant in this opinion and J J & C, Inc., will be referred to by name.

On remand we are directed to consider, pursuant to *Nawrocki v. Macomb Co Road Comm,* 463 Mich. 143; 615 NW2d 702 (2000), whether defendant breached its duty to maintain the sidewalk in reasonable repair. *Calamita, supra,* 469 Mich. at 812.[FN2] We reverse and remand, as no question of fact exists as to whether defendant breached its duty to maintain the sidewalk, at issue, in reasonable repair.

FN2. Specifically, our Supreme Court indicated:

> [W]e VACATE the Court of Appeals judgment, and REMAND this case to the Court of Appeals for consideration of this Court's decision in *Nawrocki v. Macomb Co Road Comm,* 463 Mich. 143, 615 NW2d 702 (2000), for the reason that the panel erroneously concluded that Appellant City of St. Clair Shores had a duty to maintain its sidewalks in a condition reasonably safe for public travel. In *Nawrocki v. Macomb Co Road Comm,* this Court held that the statutory reference to keeping highways in a condition reasonably safe and fit for travel does not set forth a separate duty to keep the highway "reasonably safe", but instead, the local government's duty is to "maintain the highway in reasonable repair." [*Calamita, supra,* 469 Mich. at 812.]

Determination of the applicability of the highway exception is a question of law subject to de novo consideration on appeal. *Meek v. Dep't of Transportation,* 240 Mich.App 105, 110; 610 NW2d 250 (2000). Generally, all governmental agencies are immune from tort liability for actions taken in furtherance of a governmental function. MCL 691.1407; *Collins v. City of Ferndale,* 234

Mich.App 625, 628; 599 NW2d 757 (1999). The term "governmental agency" is defined to include municipalities such as defendant. *Weakley v Dearborn Heights (On Remand),* 246 Mich.App 322, 325; 632 NW2d 177 (2001). The immunity conferred on governmental agencies is broad. *Robinson v. Detroit,* 462 Mich. 439, 455; 613 NW2d 307 (2000). However, there are several narrowly drawn exceptions to governmental immunity, including the highway [FN3] exception set forth in MCL 691.1402(1), which reads, in pertinent part:

> FN3. "Highway" is defined in MCL 691.1401(e) as "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway."

> [E]ach governmental agency having jurisdiction over any highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.... The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks or any other installation outside of the improved portion of the highway designed for vehicular travel.

In *Nawrocki, supra* at 160, our Supreme Court clarified a governmental agency's duty under MCL 691.1402(1) as follows:

> ***2** The first sentence of the statutory clause, crucial in determining the scope of the highway exception, describes the basic duty imposed on all governmental agencies, including the state, having jurisdiction over any highway: "[to] maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." This sentence establishes the duty to keep the highway in reasonable repair. The phrase "so that it is reasonably safe and convenient for public travel" refers to the duty to maintain and repair. The plain language of this phrase thus states the desired outcome of reasonably repairing and maintaining the highway; it does not establish a second duty to keep the highway "reasonably safe." *Pick,* 451 Mich. at 635-636 (RILEY, J., dissenting).

No action may be maintained under the highway exception unless it is clearly within the scope and meaning of the statute. *Scheurman v. Dep't of Transportation,* 434 Mich. 619, 630; 456 NW2d 66 (1990). The highway exception to immunity is narrowly construed. *Hatch v. Grand Haven Charter Twp,* 461 Mich. 457, 464; 606 NW2d 633 (2000). Because defendant is a municipality, its duty with regard to a highway extends to the sidewalk. MCL 691.1401(e); *Ali v. City of Detroit,* 218 Mich.App 581, 588; 554 NW2d 384 (1996).[FN4] Thus, defendant has a statutory obligation to keep a sidewalk in "reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1); see also *Nawrocki, supra* at 160 (indicating that only one duty is imposed, which is to "maintain the highway in reasonable repair"). "This means that municipalities have an obligation, if necessary, to actively perform repair work to keep such sidewalks in reasonable repair." *Jones v. Enertel, Inc,* 467 Mich. 266, 268; 650 NW2d 334 (2002).

> FN4. We note that MCL 691.1402a is not applicable as the injury in question occurred in January 1998, and the limitations provided in MCL 691.1402a are only effective as to claims arising on or after December 21, 1999.

In our previous opinion we provided the following summary of the facts:

> Plaintiff's injuries occurred when she was running near the intersection of Masonic and Harper in St. Clair Shores on the evening of January 2, 1998.

Plaintiff, resuming her training regimen after the holidays, was running on a course that she and her husband had measured out through their neighborhood. Earlier that day, construction and excavation work had been performed by defendant City of St. Clair Shores and its contractor, third-party defendant J J & C, to repair a broken water/sewer line in the area adjacent to the sidewalk. As a result, the heavy construction equipment had covered portions of the sidewalk with slippery, wet mud. However, no signs or protective devices were placed in the area warning about the muddy condition of the sidewalk. As plaintiff was running on the sidewalk along Masonic "at a fast clip," in the dark, she slipped on the mud-covered sidewalk, sustaining several broken bones and other injuries to her left hand when she fell to the pavement.

Plaintiff's allegation is that her injuries were caused when she slipped because of a mud accumulation on the sidewalk, which had been left there by J J & C. In the complaint, plaintiff does not allege that the sidewalk was in need of repair, but only that mud had accumulated on the sidewalk.

*3 Because MCL 691.1402(1) only requires defendant to maintain the sidewalk "in reasonable repair," plaintiff's claim must fail. *Nawrocki, supra* at 160. "Municipalities have an obligation, if necessary, to actively perform repair work to keep such sidewalks in reasonable repair." *Jones, supra* at 268. Plaintiff has alleged no deficiency in the sidewalk requiring repair. Upon a de novo review, we find that there is no genuine issue of material fact as to whether defendant breached its duty to maintain the sidewalk, at issue, in reasonable repair. Consequently, the trial court erred in denying defendant's motion for summary disposition.

Reversed and remanded for entry of summary disposition in favor of defendant. We do not retain jurisdiction.

Mich.App.,2004.
Calamita v. City of St. Clair Shores

Not Reported in N.W.2d, 2004 WL 435386 (Mich.App.)

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THE COURT, THE LEGISLATURE, AND GOVERNMENTAL TORT LIABILITY IN MICHIGAN

*Luke K. Cooperrider**

I. The Era of Campbell and Cooley

A. *The Original Image of the Problem: Nonfeasance and Mere Neglect, Misfeasance and Trespass, Independent Public Officers, and Legislative Decisions*

In 1961, when Justice Edwards of the Michigan supreme court said, "From this date forward the judicial doctrine of governmental immunity from ordinary torts no longer exists in Michigan,"[1] he went on to say that he was eliminating from the law of Michigan "an ancient rule inherited from the days of absolute monarchy,"[2] a "whim of long-dead kings."[3] Justice Carr, dissenting, agreed that the doctrine in question "came to us as a part of the common law,"[4] for which reason he thought it was protected by the reception clause of the Constitution of 1850[5] from the overruling action of the court. If the learned justices had looked more closely, they would have discovered that their statements were not historically accurate. The doctrine of "governmental immunity," as it has been known in recent years—that is, the rule that governmental entities are immune from tort liability for the acts of their employees whenever the injury-causing activity is "governmental" in nature or involves the performance of a "governmental function"—is not, so far as the law of Michigan is concerned, "ancient." It did not exist in 1850 and therefore can scarcely "have come to us as part of the common law" or by inheritance from monarchs, absolute or otherwise. Rather it was imported into the law of Michigan in the first two decades of the twentieth century by a generation of judges and lawyers who found it easier to read about the law in Judge Dillon's treatise on municipal corporations than to track down their own legal heritage. The instruments

* Professor of Law, University of Michigan. B.S. 1940, Harvard University; J.D. 1948, University of Michigan; Editorial Board, Vol. 46, *Michigan Law Review*.—Ed.

1. Williams v. City of Detroit, 364 Mich. 231, 250, 111 N.W.2d 1, 20 (1961).
2. Williams v. City of Detroit, 364 Mich. 231, 250, 111 N.W.2d 1, 20 (1961).
3. Williams v. City of Detroit, 364 Mich. 231, 258, 111 N.W.2d 1, 28 (1961).
4. Williams v. City of Detroit, 364 Mich. 231, 240, 111 N.W.2d 1, 5 (1961).
5. Mich. Const. sched. § 1 (1850): "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations or are altered or repealed by the legislature."

weight of American authority, which had in turn been influenced by that decision. If one is inclined to speculate about unexpressed premises, it may be that the judges saw the problem of imperfect rural highways as one of the common perils of the times, which the community dealt with as best it could through the efforts of its members, and that their sense of justice did not strongly suggest that the community be required to assume the costs of individual misfortunes arising from a risk to which all were exposed.

A few years later, in *City of Detroit v. Corey*,[34] the city was again before the court, this time as a result of an injury suffered by one Corey, who drove his wagon into a Grand River Street excavation that had been made and left unprotected by a contractor who was building a sewer for the city. The court rejected the city's "independent contractor" defense and held it liable. The court argued that, although the city streets were public highways, the sewers were the city's private property, and the people of the state at large had no interest in them.[35] The grant of power to the city to locate sewers in its streets was therefore a grant for private purposes, and the donee of such a power, whether it be a corporation or an individual, took it subject to the conditions that it shall be so executed as not unnecessarily to interfere with the rights of the public and that all proper measures be taken to guard against accidents to persons lawfully using the highway. Such an obligation is binding upon the donee personally and cannot be divested by delegating the execution of the power to another.[36]

The first case to imply a possible public liability for *nonrepair* of public facilities was *Dewey v. City of Detroit*.[37] Plaintiff had tripped on a loose plank in a city sidewalk. The trial judge told the jury that the city would be liable only if it had had notice of the defect and that notice might be inferred if the defect were open and notorious, or of long standing and of such character that it would naturally arrest the attention of persons passing by. Plaintiff's counsel argued that this condition was too restrictive, but Justice Campbell could find no fault with the charge. He did not deny the implication that liability would arise from a failure to repair after notice. He answered the plaintiff's claim of more extensive responsibility by pointing to the fact that sidewalk repairs were required by the city charter to be made under the supervision of street commissioners, that there were

34. 9 Mich. 165 (1861).
35. 9 Mich. at 184.
36. 9 Mich. at 184-85.
37. 15 Mich. 307 (1867).

only two commissioners for the entire city, and that, as a practical matter, the commissioners could not be expected to be aware of defects that were not apparent to every ordinary observer, since the walks in a city the size of Detroit covered "many scores, and probably several hundreds of miles."[38] He thought that the "minute daily inspection which is possible and necessary on a line of railroad, where a small break may endanger hundreds of lives, would be absurd and impracticable in relation to sidewalks."[39] Although it might be argued that the city could have decided to appoint more commissioners, that decision, he was firmly convinced, was legislative in character and not subject to judicial review; nor could it be made the basis of a complaint against the city.[40]

Thus, in these early decisions the court had held that road and bridge maintenance in rural areas was, under Michigan statutes, the personal responsibility of certain elected officials, and not that of any public entity, so injuries arising from the lack of repair of such facilities were not a source of community liability, and further, that the charter of the city of Detroit did not impose upon the city any obligation to provide adequate drainage for its inhabitants, so the city had no liability to private parties for failure of the drainage system to conduct surface water away rapidly enough to avoid flooding. On the other hand, the court had held that the city *was* liable to a private party harmed by the negligence of the city's contractor in opening an excavation in a public street without taking the necessary precautions to prevent accidents to users of the public way and had voiced dicta to the effect that a city would be liable for harm caused by construction operations in building a sewer, or by a sewer that, because of insufficient capacity, overflowed and cast water upon private premises. In another early case, *Pennoyer v. City of Saginaw*,[41] wherein plaintiff complained of ditches that cast surface water upon his premises, the court had also stated that a city would be liable for the continuance of a nuisance that it had created.

The evolving demarcation corresponded generally to the boundary between misfeasance and nonfeasance, with two jogs, one on each side of the line. The court had disclaimed power to interfere, under the warrant of an action for damages, with decisions that it viewed as within the legislative or discretionary powers entrusted to other branches of government. This idea was advanced as part of the argu-

38. 15 Mich. at 313.
39. 15 Mich. at 313.
40. 15 Mich. at 313.
41. 8 Mich. 534 (1860).

> repair, such township, village, city, or corporation shall be liable to, and shall pay to the person or persons so injured or disabled, just damages, to be recovered in an action of trespass on the case, before any court of competent jurisdiction.[97]

As in the earlier statute, a second section provided the same responsibility for injury to animals and other property,[98] and in section 3 a procedure was provided for collection of the judgment.[99] In section 4 it was explicitly made "the duty of townships, villages, cities, or corporations to keep in good repair, so that they shall be safe and convenient for public travel at all times, all public highways, streets, bridges, crosswalks, and culverts that are within their jurisdiction and under their care and control, and which are open to public travel."[100] Moreover, the public entities upon which the duty was imposed were authorized to levy additional taxes, up to five mills, for repair purposes if other means of financing provided by law proved insufficient;[101] it was further stipulated that "highway commissioners, street commissioners, and all other officers having special charge of highways, streets, bridges, crosswalks, or culverts, and the care or repairs thereof, are hereby made and declared to be officers of the township, village, city, or corporation wherein they are elected or appointed, and shall be subject to the general direction of such township, village, city, or corporate authorities, in the discharge of their several duties."[102] All actions brought under the statute were subject to the proviso that "it must be shown that such township, village, city, or corporation has had reasonable time and opportunity after such highway, street, crosswalk or culvert became unsafe or unfit for travel, to put the same in the proper condition for use, and has not used reasonable diligence therein."[103]

One hardy defense attorney argued thereafter that the 1879 statute was still ineffective to impose liability upon a township, because the repair duty continued to rest upon the highway commissioners as individuals and their office was created by the constitution, which did not subject them to the general direction of the township authorities as the statute proposed to do.[104] Justice Cooley, however, tendered the court's surrender. He conceded that the legislature's intent in

97. Act of May 29, 1879, No. 244, § 1, [1879] Mich. Pub. Acts 223.
98. Act of May 29, 1879, No. 244, § 2, [1879] Mich. Pub. Acts 223.
99. Act of May 29, 1879, No. 244, § 3, [1879] Mich. Pub. Acts 224.
100. Act of May 29, 1879, No. 244, § 4, [1879] Mich. Pub. Acts 224.
101. Act of May 29, 1879, No. 244, § 4, [1879] Mich. Pub. Acts 224.
102. Act of May 29, 1879, No. 244, § 4, [1879] Mich. Pub. Acts 224.
103. Act of May 29, 1879, No. 244, § 4, [1879] Mich. Pub. Acts 223, 224.
104. Burnham v. Township of Byron, 46 Mich. 555, 9 N.W. 851 (1881).